88-574

Supreme Court, U.S.
FILED
AUG 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN ALBERT STRAND

PETITIONER,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
J. LAWRENCE IRVING DISTRICT JUDGE,
ROBERT M. MESSICK ATTORNEY
DEPARTMENT OF JUSTICE,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where in the Constitution does it state Judge J. Lawrence Irving and Attorney Robert M. Messick can lie in Court Order?

2. Where in the Constitution does it state the Respondents, Defendants are immune from suit?

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TABLE OF AUTHORITIES

Respondent has excluded cases as there contents may be lies like the enclosed case.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution Amendments One, Five, and Seven. Page 3 and 4.

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RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, JOHN ALBERT STRAND, respectfully prays that a Writ of Certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered on 12 May 1988.

OPINION

The Court of Appeals entered its Memorandum decision affirming the denial of Petitioners Appeal on 12 May 1988. A copy of the Memorandum is attached as Appendix A.

The Court of Appeals denied Petitioners Petition for review 7 June 1988. A copy of the order is attached as Appendix B.

The Order Dismissing Complaint filed 18 February 1987 by District Court is attached as Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered on 12 May 1988. A timely Petition for Rehearing was denied on 7 June 1988. The Jurisdiction of this Court is invoked under the authority of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 1: and to Petition the Government for a redress of grievances. Amendment 5: Nor shall any person . . . be deprived of life, liberty, or property, without due process of law. Amendment 7: the right of trial by jury shall be preserved.

STATEMENT OF THE CASE

On 12 May 1988, a panel of the Ninth Circuit Court of Appeals affirmed the defendants are immune from suit, the suit must be dismissed regardless of the merits of the plaintiff's claims. A timely Petition for Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure was filed 19 May 1988. The petition was denied on 7 June 1988 by the Ninth Circuit.

REASON FOR GRANTING THE WRIT

Where petitioner's rights given to him by the Constitution can be taken away by dictatorial, discriminatorial laws and then Petitioner files a Complaint the 1st Amendment to the Constitution for a redress of grievances, the 5th Amendment to the Constitution due process of law (fair trial), the 7th Amendment to the Constitution the right of trial by jury shall be preserved. The Department of Justice Attorney Robert M. Messick and District Judge J. Lawrence Irving lie in Court orders. Then District Judge Judith N. Keep, states the Defendants are immune from suit, the Ninth Circuit Court of Appeals affirmed the defendant's are immuned from suit. The Petitioner has no rights under these Dictatorial Conditions.

CONCLUSION

Where lies can be used to make Court

Orders this is the start of a conspiracy, then the Ninth Circuit Court of Appeals states the Defendants are immuned from suit continuing the conspiracy. This is no longer a Court of Justice, it is a complete Dictatorship.

When the Government and the courts can lie and do as they please this is Dictatorship, it is Dictator Reagan. Tell the children there is no more (with liberty and justice for all). From PLEDGE OF ALLEGIANCE TO THE FLAG. Tell the people of the United States there is no more (that this nation, under God shall have a new birth of freedom--and that government of the people, by the people, for the people, shall not perish from this earth). From the GETTYSBURG ADDRESS. We now have a Dictatorship. Petitioner is a victim of this Dictatorship. This court must declare immunity for its Dictators a violation of the Constitution.

For the foregoing reasons, petitioner JOHN A. STRAND respectfully requests that a writ of certiorari issues to review the judgement of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

John Albert Strand

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Dated 15 September 1988.

APPENDICES

FILED May 12 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS
FOR THE NINTH DISTRICT

JOHN ALBERT STRAND,	No. 87-5714
Plaintiff-Appellant,	D.C. N. 86-1953-K
v.	
THE GOVERNMENT OF THE UNITED STATES, UNITED STATES DEPARTMENT OF JUSTICE, ROBERT M. MESSICK and UNITED STATES DISTRICT JUDGE J. LAWRENCE IRVING,	MEMORANDUM*
Defendants-Appellees.	

Appeal from the United States
District Court for the
Southern District of California

Hon. Judith N. Keep, Presiding

Submitted: February 26, 1988**

Before: MERRILL, REINHARDT and HALL,
Circuit Judges

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel finds this case appropriate for submission without argument pursuant to 9th Cir. R. 34-4- and Fed. App. P. 34(a).

FACTS

On September 18, 1986, John Albert Strand filed a pro se complaint against the United States, the United States Department of Justice and its employee attorney Robert M. Messick, and United States District Court Judge J. Lawrence Irving. The complaint alleged a cause of action for "compensatory and punitive damages for $10,000,000" plus costs because attorney Messick had made "distorted statements and lies" in a motion to dismiss an earlier action by Strand, and Judge Irving had "agreed with" Messick by ordering the dismissal. Strand further alleged that "the Government of the United States negligently failed to properly instruct, supervise, control and discipline" Judge Irving, and that the United States and the "Department of Justice negligently failed to properly

instruct, supervise, control and discipline Defendant Robert M. Messick on a continuing basis." Strand claimed that the acts of the defendants were a "conspiracy, . . . lible and slander," and deprived him of the "constitutional and statutory rights guaranteed to me . . . by the first, fifth, seventh and fourteenth amendments of the Constitution of the United States" and by 42 U.S.C. §§ 1983 & 1985.

The district court dismissed the complaint with prejudice based upon the sovereign immunity of all the defendants, and, with regard to Judge Irving and attorney Messick in their individual capacities, on the basis of judicial and quasi-judicial immunity. The district court also found that Strand had failed to allege a denial of his constitutional rights. On October 15, 1987, Strand filed this timely notice of appeal.

ANALYSIS

The district court determined that it lacked subject matter jurisdiction based upon the sovereign immunity of some defendants, and the judicial and quasi-judicial immunity of defendants Judge Irving and Assistant United States Attorney Messick, in their individual capacities. Strand contends that the district court's dismissal of his complaint based on these immunities was in error. The existence of subject matter jurisdiction presents a question of law, which is reviewed de novo by this court. Peter Starr Production Co. v. Twin Continental Films, 783 F.2d 1440, 1442 (9th Cir. 1986).

The United States is immune from suit unless it expressly waives immunity and consents to be sued. United States v. Shaw, 309 U.S. 495, 500-01 (1940);

Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). Absent express statutory consent to sue, dismissal is required. Id. Additionally, the Department of Justice, as a federal agency, is also protected by sovereign immunity and is not subject to suit el nomine, absent express consent. City of Whittier v. Department of Justice, 598 F.2d 561, 562 (9th Cir. 1979). The United States has not provided a statutory waiver of sovereign immunity applicable to the present action.

Under certain circumstances, the Federal Tort Claims Act ("the Act") may provide a limited waiver of sovereign immunity. However, the Act specifically excludes: (1) any claims based upon the performance of a discretionary function or duty on the part of a federal employee, "whether or not the discretion involved

[was] abused," 28 U.S.C. § 2680(a); (2) any claims "arising in respect of the assessment or collection of any tax," 28 U.S.C. § 2680(c)[1/]; and (3) any claims "arising out of libel, slander, misrepresentation, [or] deceit," 28 U.S.C. § 2680(h). Each of these exclusions defeats a waiver under the Act; thus sovereign immunity prohibits Strand from filing the present action. Additionally, the Act specifically prohibits the award of punitive damages, which were requested in the present action. 28 U.S.C. § 2674. Finally, Strand's action may not be maintained under the Act, because he has not alleged or shown that he has filed an administrative claim prior to filing

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1/ Strand's initial action against the United States alleged that he was prohibited from filing a joint income tax return, which he preferred to to do in order "to save money," because his wife elected to file separately. This, he claimed, resulted in unconstitutional discrimination.

of this action, as required by the Act. 28 U.S.C. § 2675(a).

The Bivens doctrine allows suits in certain circumstances agaisnt federal officials. Under Bivens, a plaintiff may sue federal officers in their individual, rather than their official, capacity. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971); Holloman v Watt, 708 F.2d 1399, 1401-02 (9th Cir. 1984), cert. denied, 106 S. Ct. 1183 (1985). However, a Bivens claim may not be brought against the United States or federal officials acting in their official capacity. Id. Since Strand's suit is against the United States and the federal employee defendants as federal officials and not as individuals, Bivens provides no jurisdictional basis for his claim.

Further, even if Strand had named Judge Irving and Assistant United States

Attorney Messick in their individual capacities, his claim would still be barred, due to judicial and prosecutorial immunity.[2/] Judges are absolutely immune from liability in suits such as this one, seeking civil damages for their judicial acts. Ashelman v. Pope, 793 F.2d 1072, 1075 (9th Cir. 1986) (en banc); see Forrester v. White, 108 S. Ct. 538 (1998); see also Mullis v. Bankruptcy Court, 828 F.2d 1385, 1388 (9th Cir. 1987).

Messick is also immune from liability in this action under prosecutorial immunity. Prosecutors are immune from a civil suit for damages in a 42 U.S.C. § 1983 action. Imbler v. Pachtman, 424 U.S. 409, 431 (1976); see also Ashelman, 793 F.2d at 1076 ("where a prosecutor

---

2/ In addition to this immunity, there is no indication in the record that Strand ever established personal jurisdiction over Judge Irving or Attorney Messick by service of process upon them.

acts as an advocate 'in initiating a prosecution and in presenting the state's case,' absolute immunity applies.").

Because all the defendants in the action were immune from liability, the allegations of a conspiracy among them add nothing to the issue. Thus, the district court did not err in dismissing the complaint with prejudice.[3/] The decision of the district court is affirmed.

3/ Strand also appeals from the district courts dismissal of his complaint with prejudice for failure to state a claim upon which relief can be granted. We need not address this issue because the immunity of the defendants alone provides a basis for affirming the district court's dismissal. Where the defendants are immune from suit, the suit must be dismissed regardless of the merits of the plaintiff's claims. See Ashelman v. Pope, 793 F.2d at 1079.

FILED Jun 7 1988
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN ALBERT STRAND, PLAINTIFF-Appellant, v. THE GOVERNMENT OF THE UNITED STATES, UNITED STATES DEPARTMENT OF JUSTICE, ROBERT M. MESSICK and UNITED STATES DISTRICT JUDGE J. LAWRENCE IRVING, Defendants-Appellees.	No. 87-5714 D.C. No. 86-1953K O R D E R

Before: MERRILL, REINHARDT and HALL,

Circuit Judges

The panel has voted to treat the petition for review as a petition for rehearing. The petition for reharing is denied.

FILED 87 FEB 18 A9:59
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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Attorneys for Defendants

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JOHN ALBERT STRAND,	)	Civil No.
	)	86-1953-K
Plaintiff,	)	(IEG)
	)	
v.	)	ORDER
	)	DISMISSING
UNITED STATES OF AMERICA, et al.,	)	COMPLAINT
	)	
Defendants.	)	
	)	

The motion of the federal defendants to dismiss plaintiff's complaint came

on regularly for hearing on February 2, 1987 at 10:30 before the Honorable Judith N. Keep. Plaintiff appeared pro se. The federal defendants were represented by Assistant United States Attorney Robert H. Plaxico.

After due consideration of the pleadings filed on behalf of the respective parties, it is ordered that plaintiff's complaint be dismissed in its entirety with prejudice.

RHP:lac/2
8607605

To the extent that plaintiff is suing the United States, and its agency, the Department of Justice, and government employees, Judge Irving and Robert Messick, plaintiff's suit is barred by the doctrine of sovereign immunity. Additionally, the individual defendants, Irving and Messick, are immune from suit, for acts done in the scope of their

official duties, under the doctrines of judicial and quasi-judicial immunity.

Finally, the court finds that on the face of the complaint, plaintiff has failed to allege a denial of his First Amendment, Fifth Amendment due process, or Seventh Amendment trial rights, and that the Fourteenth Amendment does not apply to this federal case.

As such, plaintiff's complaint should be dismissed in it entirety with prejudice. The court declines at this time to issue an injunction barring plaintiff from seeking to further litigate the issues raised in this case and the underlying action before Judge Irving. However, plaintiff may be subject to sanctions should any further attempts in that regard be made.

IT IS SO ORDERED. Date 2-12-87

JUDITH N. KEEP
UNITED STATES DISTRICT JUDGE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No.

JOHN ALBERT STRAND

PETITIONER,

v.

UNITED STATES OF AMERICA,
UNITED STATES DEPARTMENT OF JUSTICE,
J. LAWRENCE IRVING DISTRICT JUDGE,
ROBERT M. MESSICK ATTORNEY
DEPARTMENT OF JUSTICE,

RESPONDENTS.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) s.s.:
COUNTY OF SAN DIEGO)

FRED JEMISON, after being duty sworn, disposes and says that pursuant to rule 28.4 (a) of this Court, he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH

CIRCUIT on Respondent's by enclosing

three copies thereof in an envelope,

first class postage prepaid, addressed to:

Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

MICHAEL L. PAUP
Chief, Appellate Section Tax Division
Department of Justice
Post Office Box 502
Washington, D.C. 20044

J. LAWRENCE IRVING
United States District Judge
United States Courthouse
940 Front Street
San Diego, California 92189

ROBERT M. MESSICK
Attorney U.S. Department of Justice
P.O. Box 683
Washington, D.C. 20044

and depositing same in the United States

mails at Chula Vista, California, on 15,

September 1988.

Fred M Jemison

FRED JEMISON Affiant

Subscribed and Sworn to Before Me
this 15th day of September 1988.

OFFICIAL SEAL
J. E. BALTIERRA
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires March 5, 1990

J. E. Baltierra

Notary Public in and For Said
County and State